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 1                 UNITED STATES DISTRICT COURT

 2                  DISTRICT OF SOUTH DAKOTA

 3                     SOUTHERN DIVISION

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                                          Civ. 11-4121
 5
      ARGUS LEADER MEDIA,
 6    dba ARGUS LEADER,

 7                     Plaintiff,

 8         -vs-

 9    UNITED STATES DEPARTMENT
      OF AGRICULTURE,
10
                       Defendant.
11

12

13                                        U.S. District Courthouse
                                          Sioux Falls, SD
14                                        May 24, 2016
      *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *
15                     COURT TRIAL

16                    PARTIAL TRANSCRIPT

17            TESTIMONY OF ANDREW JOHNSTONE
      *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *   *
18
      BEFORE:   The Honorable Karen E. Schreier
19              U.S. District Court Judge
                Sioux Falls, SD
20

21    APPEARANCES:

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 1              * * * * *  MAY 24, 2016  * * * * *

 2         (In open court, counsel present, including counsel

 3    for the witness, William R. Clayton, at 3:41 p.m.)

 4              THE COURT:  The United States may call their

 5    next witness.

 6              MS. BENGFORD:  United States would call

 7    Andrew Johnstone.

 8              MR. CLAYTON:  Good afternoon, Your Honor.

 9    If I may announce my appearance.  I'm William Clayton,

10    William R. Clayton.

11              THE COURT:  Yes.  Thank you.

12                    ANDREW JOHNSTONE,

13    called as a witness, being first duly sworn, testified as

14    follows:

15                   DIRECT EXAMINATION

16    BY MS. BENGFORD:

17       Q.   Would you state your name and spell your name.

18       A.   Andrew Johnstone.  That's A-N-D-R-E-W

19    J-O-N-N-S-T-O-N-E.

20       Q.   And are you currently employed?

21       A.   I am.

22       Q.   And how are you employed?

23       A.   I am employed as an associate general counsel for

24    Sears Holdings Management Corporation.

25       Q.   And can you please describe your educational
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1   background to the Court.

2   A.   Sure.   I graduated with a Bachelor's degree in

3   political science and history from the University of

4   Illinois at Urbana-Champaign in 1985.

5   Then I attended law school at the University of

6   Michigan and graduated in 1998.

7   Q.   After you graduated from law school, where did

8   you go work?

9   A.   I joined the law firm of Kirkland & Ellis in

10   Chicago.   I worked there for roughly five years.

11   Then I clerked for Judge Amy St. Eve in the

12   Northern District of Illinois for a year.

13   After that I went to work for Winston & Strawn,

14   another law firm in Chicago.   I was there roughly ten

15   years before I came to work for Sears Holdings.

16   Q.   And how long have you been with Sears Holdings?

17   A.   It's over three years at this point, coming up on

18   three and a half.

19   Q.   And can you specifically describe what your

20   duties involve?

21   A.   So as associate general counsel, I obviously have

22   a legal role advising the company, but I also work

23   closely with management of some of our different

24   businesses, advising them on business issues.

25   So, for example, one of the subsidiaries of

1   Sears Holdings is Kmart Corporation, and I work closely

2   with the grocery and pharmacy business, advising them

3   both on business and legal issues.

4   Q.   And at some point did you become aware of the

5   case which brings you here to South Dakota to testify

6   today?

7   A.   Yes.

8   Q.   How did you become aware?

9   A.   I think I became aware sometime last year when I

10   learned that there was a decision from the Court of

11   Appeals that sent the case back to the District Court

12   that set the groundwork for summary judgment and the

13   trial we're having now.

14   Q.   What is your understanding of the issue of the

15   information that is being requested?

16   A.   From K-Mart's perspective, it's store-level data

17   about SNAP purchases. At Kmart Stores, I should say.

18   Q.   And can you describe the relationship between

19   Sears Holdings and Kmart?

20   A.   Sure. Sears Holdings is a holding company, as

21   the name would suggest. If you were to buy Sears stock,

22   you are buying stock in Sears Holdings.

23   Sears Holdings owns Sears Roebuck, the

24   130-year-old retailer that everybody knows, and it also

25   owns Kmart Corporation. They are wholly owned

1   subsidiaries of Sears Holdings.

2   Sears Holdings Management Corporation is exactly

3   like the name suggests, a management corporation. I'm

4   employed by that, so that I can advise or work with both

5   Sears Roebuck and Kmart.

6   Q.   And you are here on behalf of Kmart today. Would

7   that be correct?

8   A.   Yes. I'm here on behalf of Kmart.

9   Q.   How many Kmart stores are there?

10   A.   Today there are roughly 890 Kmart stores. We are

11   in 49 states, plus Puerto Rico, U.S. Virgin Islands, and

12   Guam.

13   That's Kmart; not Sears. That's a separate count

14   for them.

15   Q.   And is there an area where Kmart has its largest

16   concentration?

17   A.   Yes. We have the highest number of stores in the

18   State of California. It stands to reason. It's the most

19   populus state in the U.S.

20   So that's where most of -- I wouldn't say "most."

21   The greatest number of stores is in California as

22   compared to any other state.

23   Q.   And do all Kmart stores participate in SNAP?

24   A.   Yes. All Kmart stores participate in the SNAP

25   Program.

1   Q.   Would that have been true during the 2005 to 2010

2   time frame?

3   A.   Yes. It would be.

4   Q.   And how long has Kmart been part of Sears

5   Holdings?

6   A.   Since 2005. It's interesting. Most people don't

7   know this. Kmart actually bought Sears. So that

8   transaction resulted in the formation of Sears Holdings

9   Company, and Kmart and Sears being organized as

10 wholly owned subsidiaries of SHC.

11   Q.   Generally can you discuss K-Mart's current

12 financial position in the grocery industry?

13   A.   Sure. I think I would say that the retail

14 industry, as a whole, is a very challenging environment,

15 especially for traditional brick and mortar retailers

16 like Kmart. But the grocery business is especially

17 competitive.

18   I don't think it's surprising to anyone to hear

19 that Kmart has not performed well over the last several

20 years. We've lost money. We've felt the competitive

21 pressures from that challenging environment perhaps as

22 keenly as anybody.

23   Q.   Are you familiar with the margins generally in

24 the industry?

25   A.   You mean the grocery margins?

1   Q.   Yes.

2   A.   Yes, I am.

3   Q.   And what information do you have about those?

4   A.   I would say in the industry the margins are very

5   low.   Certainly, although I don't want to get into

6   K-Mart's specific margins, because that's information we

7   deem confidential and proprietary and we don't disclose,

8   but I'm comfortable saying our margins in grocery are

9   low.

10   Q.   And how do margins change in relationship to

11   volume?

12   A.   Well, I mean obviously when you are in a

13   low-margin business, you try to make up for that by

14   having high volume, to make being in the business

15   worthwhile.

16   So if you lose business in a low-margin category,

17   that makes the continued viability of that business -- or

18   it leads you to question the continued viability of that

19   business, I guess I would say.

20   Q.   And is grocery an important part of Kmart?

21   A.   Yes.

22   Q.   And why is grocery important?

23   A.   Well, Kmart likes to offer a full assortment of

24   goods to customers.   Grocery is an important component of

25   the full assortment that Kmart likes to offer.

1   In some ways we are a discount retailer, so we go

2   after value-conscious customers, customers who have less

3   disposable income.

4   And being able to offer a one-stop shop, so to

5   speak, that includes grocery, we think is one of our core

6   competitive advantages.

7   Q.   And does it bring additional customers in, if you

8   know?

9   A.   Yes. I think having grocery, we at Kmart have

10   concluded that that makes Kmart a more appealing

11   destination for many of our members and customers.

12   Q.   And does Kmart release financial information as

13   to Kmart?

14   A.   So Sears Holdings is a publicly traded company,

15   and we make financial disclosures consistent with the

16   SEC's rules and regulations. Kmart is a wholly owned

17   subsidiary of SHC, so we do not do separate financial

18   reporting.

19   I know that in the SHC financial statements,

20   there's some high-level information about K-Mart's

21   performance. But, no, we do not specifically publish

22   comprehensive Kmart financials.

23   Q.   And why not?

24   A.   We don't think that there's any competitive

25   advantage to us in providing that information.

1   To the contrary, we think K-Mart's financial

2   performance, that's confidential and proprietary.

3   Q.   And do you provide individual SNAP information

4   publicly? Is that available?

5   A.   No. We do not publish or make available in any

6   way SNAP information as to Kmart.

7   Q.   Do you take certain protections within the

8   company to protect this type of information?

9   A.   So as with all confidential, business,

10   trade-secret type information, we do take various steps

11   to protect it from disclosure, whether deliberate or

12   indifferent.

13   All of our employees are trained that they have

14   an affirmative obligation to maintain the confidentiality

15   of our financial information. They get regularly trained

16   on that.

17   Sears Headquarters is located in Hoffman Estates,

18   Illinois, outside of Chicago.

19   The Sears Campus, where most of the management

20   and financial-type people actually work, is a closed

21   campus. You can't get on to the campus without being an

22   employee with a badge. Or if you're a visitor, you have

23   to be escorted at all times. You have to be checked in.

24   And then there's -- our computer networks, we

25   have an IT department that works to keep the security of

 1   our computer networks, and ensure that the information

 2   that we maintain is not available, that it's kept

 3   confidential.

 4   Q.   And does Kmart itself track individual stores'

 5   SNAP redemption sales information?

 6   A.   Obviously Kmart does pay very close attention to

 7   what's happening at all of its stores. Included in what

 8   we track is the individual SNAP sales at specific Kmart

 9   locations.

10   Q.   Why do you track this information?

11   A.   Well, we track all of this information, including

12   SNAP sales, because we want to make sure that we're not

13   passing up opportunities to be more efficient, to do a

14   better job appealing to our members and customers, so

15   that we have a good understanding of who our members and

16   customers who shop at particular K-Marts are, and how we

17   might better appeal to them through the right assortment

18   of products or the right advertising outreach.

19   So that's all part of the effort that we devote

20   to driving the highest possible sales volume at each

21   individual Kmart store.

22   Q.   I'm sorry if I already asked, but I just want to

23   make sure I did. The SNAP information has the same level

24   of confidentiality and protections that you previously

25   described?

1   A.   It does. It's not something that we disclose or

2   publish. It's not something that's publicly available in

3   any way.

4   Q.   And do you know what Kmart sales were for the

5   last year, as far as its grocery business?

6   A.   I would say -- I want to be careful here, because

7   this is not something that we publicly break out. I

8   would say it's a substantial part of our business.

9   The overall amount of our sales, Kmart sales in

10 the last year, that was publicly available, but we didn't

11 break out the grocery sales. I would say it's a

12 substantial part of that overall business.

13   Q.   And who are your biggest competitors? Do your

14 competitors vary?

15   A.   We have a wide and increasing range of

16 competitors. No surprise, it's already been mentioned

17 today, Walmart is a significant competitor for us.

18 Target.

19   In the grocery and pharmacy business, traditional

20 grocers, supermarkets are also our competitors. We also

21 compete with places like Home Depot when it comes to

22 non-grocery categories.

23   And then, increasingly, we are competing more and

24 more with internet or online providers. Even Amazon is

25 getting into the grocery business.

1   Q.   And have you closed stores as a result of

2   competition?

3   A.   Yes.   It's a matter of public record that as

4   Kmart has not done well financially over the last several

5   years, that we have been forced to close a significant

6   number of our stores.

7   Q.   And are you aware of customers switching stores?

8   A.   Yes.   I mean, for example, we've closed stores,

9   as I mentioned, over the last several years.

10   Fundamentally that happens because the stores,

11   they're no longer profitable, and that's because people

12   have switched from shopping at Kmart to one of our

13   competitors.

14   Beyond that, we're always mindful of the need to

15   continue to be attractive to our members and customers so

16   they will continue to shop at Kmart.

17   Q.   Do you do specific, any specific marketing for

18   low-income customers?

19   A.   I think the previous witness said it pretty well.

20   He said he wants to be all things to all customers.   I

21   think that's a fair thing to say or a fair statement to

22   make about Kmart, as well.

23   But we absolutely do try to attract, we do try to

24   market to low-income consumers, consumers who take

25   advantage of the SNAP Program.

1   Q.   When you provided SNAP, let me see, did you have

2   any expectations as far as individual store SNAP

3   information? Kmart, did they have any expectations

4   regarding this type of information?

5   A.   You mean when we submitted that to the

6   Government?

7   Q.   Well, do you submit that information to the

8   Government?

9   A.   Yes. We have submitted information about

10   individual SNAP -- or sales through the SNAP Program at

11   individual stores has been provided to the Federal

12   Government, yes.

13   Q.   So how did you do that or when? I'm not aware of

14   that.

15   A.   Well, again, in order to be reimbursed from SNAP,

16   we have to provide reporting to the Federal Government

17   about that. I'll confess, I think there might be a

18   third-party administrator that would be in the middle.

19   How it works, I don't have the details of that.

20   I do know that information has been provided to the

21   Federal Government.

22   Q.   So you are not familiar with how SNAP payment

23   works?

24   A.   I mean I'm generally familiar. I'm aware of what

25   SNAP is. I know how it works. When a member or customer

1   goes into one of our stores, and I know that we get

2   reimbursed for it.

3   But if you're asking for how the program is

4   administered on the back end, I'm not the right person to

5   speak to that.

6   But I think you started to ask what K-Mart's

7   expectation was when it provided SNAP data. Did I miss

8   that?

9   Q.   Well, I asked if you had expectations regarding

10   SNAP data.

11   A.   Well, I mean it is certainly K-Mart's

12   expectation, when it submits that information to the

13   Government, that that is not going to be publicly

14   available.

15   Q.   And why is SNAP information valuable, if it is

16   valuable?

17   A.   It is valuable. Like all the information that we

18   collect and maintain about the performance of individual

19   stores, we do regard that information as very valuable.

20   We do seek to protect that information. We don't

21   disclose it publicly. We would prefer that it not be

22   publicly available. We think the public disclosure of

23   that could cause substantial harm to Kmart.

24   Q.   And can you explain why you believe there could

25   be competitive harm to Kmart?

1   A.   Sure.   As I think I said earlier, the retail

2   industry, in general, is highly competitive; grocery,

3   especially so.   Kmart has felt the impact of that

4   competition, especially over the last few years.

5   Any information about the performance of our

6   stores, about the particular customers who shop at our

7   stores, what they are buying at our stores, that provides

8   insights to our competitors that would help them

9   potentially steal customers away from Kmart.

10   Q.   Are there any other reasons why you believe that

11   the release of the individual SNAP store information

12   could result in competitive disadvantage to Kmart?

13   A.   Well, it's been mentioned so far in this trial

14   that SNAP -- the fact that a particular base of customers

15   at a store are SNAP customers.   The disclosure of that

16   information could have a stigmatic effect or a negative

17   effect.   We, at Kmart, we got really mindful of that.

18   There's an additional sort of wrinkle when it

19   comes to Kmart.   Although we own many of our stores, we

20   also lease stores.   We are concerned that if landlords

21   learn that a particular location where we are a tenant

22   has a substantial SNAP customer base, so to speak, that

23   they will react negatively to that, and that they will

24   put pressure on us, either to pay higher rent to maintain

25   our location, or that they will seek to force us out.

1   Certainly there are landlords in particular

2   locations, strip malls or malls, who prefer to have a

3   more luxury-type experience, would prefer not to have a

4   SNAP customer base.

5   So that's something we are concerned about

6   potentially from the disclosure of this information.

7   Q.   Any other disadvantages, competitive

8   disadvantages?

9   A.   The primary one would be the concern that that

10   sort of detailed store-level data provides unique

11   insights that would facilitate competitors' efforts to

12   steal our customers.

13   I would say that's the primary one.

14   Q.   And does Kmart think that the fact that everyone

15   is getting this information would mean that there is no

16   competitive harm to Kmart?

17   A.   I would disagree with that statement.

18   Q.   And can you explain why?

19   A.   Well, Kmart has experienced declining sales over

20   the last several years. Frankly, we are focused on

21   maintaining the customers that we have.

22   If you look at some of our competitors, for

23   example, Walmart, they are substantially larger than

24   Kmart. They have access to more resources.

25   I would be concerned, Kmart would be concerned

1   that they could do more with this information than we

2   could, and that the net effect of the release of the

3   information is that Kmart would suffer more lost sales,

4   lost members, and customers than our competitors.

5   MS. BENGFORD: Thank you.   I have no

6   additional questions at this time, Your Honor.

7   THE COURT: Mr. Arneson?

8   CROSS-EXAMINATION

9   BY MR. ARNESON:

10   Q.   Mr. Johnstone, I guess we both spent some time in

11   Champaign-Urbana.

12   A.   Oh, really? Yes.

13   Q.   What's the 50th state where you are not?

14   A.   Alaska.

15   Q.   Okay.   That's what I would have guessed.   I think

16   I'll work this backwards.   It's fresher in my mind.

17   When you were suggesting here, the stigma of

18   being associated with SNAP can cause some problems

19   perhaps with lessors, that's not really a competitive

20   issue, though.   Is it?

21   A.   I would say that it is, because if a landlord is

22   unhappy that we have a substantial SNAP customer base at

23   a particular store, and he responds by making our

24   situation difficult by asking for higher rent, for

25   example, or by refusing to agree to extend our option to

1   remain in a particular location, that has a negative

2   competitive effect on Kmart.

3   Q.   It has a negative effect on Kmart.

4   A.   Well, it makes us less able to compete with

5   Walmart or Target or grocery chains, because a location

6   would become more expensive, or we would lose it

7   potentially.

8   Q.   Were you involved at all in the preparation of

9   any other documents that Kmart filed in this case?

10   A.   I'm aware of the declaration. I did not

11   participate in the declaration that was submitted. But I

12   have reviewed it, and I agree with it.

13   Q.   And I think you said that you're a big company,

14   but -- go ahead. I'll let you get a drink.

15   A.   Sorry.

16   Q.   That's okay. I think you said you are obviously

17   a big company, but there are bigger.

18   A.   Yes. We are dwarfed by Walmart, Target, and

19   Amazon.

20   Q.   Now, what you're saying, I think, is that your

21   biggest concern is that if your SNAP numbers are

22   disclosed, that you will be targeted, and people will

23   take your SNAP business from you. Is that a fair

24   assessment?

25   A.   I agree with that. I would say it's a broader

1   concern than that, if I could explain.

2   Q.   Go ahead.

3   A.   I think that any sort of information about the

4   performance of individual stores, the particular sales at

5   those stores, to the extent any additional information

6   about a store is released, that provides a hook, a new

7   way for our competitors to compete more effectively with

8   us.

9   If they know the SNAP sales at a particular

10   location, that will help inform them of ways they can go

11   after our SNAP customers, but they can also infer things

12   about the other ways that we succeed in that store, and

13   they can make educated guesses that helps them compete

14   more effectively.

15   So it's not just that SNAP, the release of SNAP

16   data makes the possibility that we will lose SNAP

17   customers possible -- I didn't express that very

18   artfully. I'm sorry.

19   It's just any information about the performance

20   of an individual store is a competitive advantage that

21   would help our competitors steal our members and

22   customers.

23   Q.   But it is also true that you would have the same

24   information about the other SNAP stores.

25   A.   So it's my -- I confess. Beyond the Kmart

1   information, I don't know what other information is

2   potentially subject to release as a result of this case.

3   Based on what I've heard, I understand that other

4   retailers' information is potentially out there.

5   So, yes, I assume, I speculate that there would

6   be SNAP sales at individual stores for other retailers,

7   as well, that would be disclosed.

8   Q.   Let me help you. The request is for the annual

9   SNAP volume for every retailer in the program.

10   A.   Okay. Thank you.

11   Q.   So you're not being targeted.

12   A.   I appreciate that.

13   Q.   No pun intended there either.

14   A.   I've heard it before.

15   Q.   I'm sure you have. Now, you said you agree with

16   the contents of previous Kmart submissions.

17   A.   I do.

18   Q.   In one of those submissions, was there not some

19   reference to the actual effect -- let me rephrase that.

20   Were you here for Mr. Hays' examination, the man

21   from Tennessee?

22   A.   Yes, I was.

23   Q.   You heard him clearly trying to distinguish for

24   my benefit the difference between a stigma attaching to

25   the customer as opposed to one attaching to the store?

1   A.   Right.

2   Q.   Is it fair to say that Kmart is concerned about a

3   stigma attaching to the store?

4   A.   I would say we're concerned about both. I know

5   the Kmart declaration didn't address the store stigma

6   issue, but it's something that I'm personally familiar

7   with outside of the SNAP context.

8   I do know that Kmart is concerned about that

9   potential stigma, as well.

10   Q.   Who is Susie Macks?

11   A.   She is an employee. I believe she's in marketing

12 for Kmart Grocery and Pharmacy.

13   Q.   Didn't she identify the problem of being

14 identified -- I'm using that word a lot.

15   Did she not identify the problem, perceived

16 problem of being labeled a "SNAP food store"?

17   A.   Yes. I believe she did in her declaration.

18   Q.   Now, clearly Kmart is not alone in having

19 economic problems on occasion. Is that fair?

20   A.   Yes. I'm sure there are other retailers who have

21 experienced challenges similar to Kmart.

22   Q.   Have we not read recently about Walmart closings?

23   A.   I think I'm generally aware that Walmart has had

24 some store closings of late. Yes.

25   Q.   So you're not suggesting that anybody should be

1   totally protected from competition. Are you?

2   A.   No.

3   Q.   And you are aware, are you not, that -- does

4   Sears, does the Sears subsidiary, do they sell food?

5   A.   It's possible that they sell some food items.

6   But they do not have a grocery and pharmacy component,

7   the way that Kmart does.

8   Q.   So if I refer to Kmart, that would take care of

9   what your involvement is.

10   A.   Yes.

11   Q.   So Kmart has all its stores participating in

12   SNAP. Is that right?

13   A.   Yes.

14   Q.   And that's voluntary. Right?

15   A.   Yes.

16   Q.   If you know, you're not protected by the

17   Government from competition in the SNAP Program. Are

18   you?

19   A.   If I understand your question, no, the Government

20   isn't guaranteeing a certain amount of SNAP business.

21   No.

22   Q.   They're not guaranteeing that they will do

23   anything to limit competition that you might face. Are

24   they?

25   A.   Not to my knowledge.

1   Q.   So competition is just part of the landscape.   Is

2   that fair?

3   A.   I think it's fair to say that competition has

4   always been part of the retail landscape.

5   Q.   Has the grocery business, as you know it, always

6   been considered a low-margin industry?

7   A.   I have to be careful. I don't want to get over

8   my skis here. I have to speak to my experience, my

9   knowledge.

10   I've only been with Sears for three years. I'm

11   familiar and knowledgeable about K-Mart's business over

12   the last 10 or 15 years or so. Going back in time, I

13   hesitate to say "always."

14   I do know that the margin pressure in the grocery

15   business has gotten more intense over the last 15 or 20

16   years or so.

17   Q.   So clearly people are making business decisions

18   to expand or contract with the information that's

19   available now. Is that right?

20   A.   I'm not sure. Are you asking about whether our

21   competitors are making decisions about --

22   Q.   Yes.

23   A.   Okay. Yes. Certainly our competitors are making

24   decisions about whether to expand and contract based on

25   their perceived ability to compete.

1   Q.   And without divulging any corporate secrets, you

2   engage in market research?

3   A.   We do. Absolutely, we do.

4   Q.   And is there a lot of information available to a

5   market researcher?

6   A.   I mean certainly there's all sorts of

7   information. I would say that individual store-level

8   data, like the SNAP data issue, is not something that is

9   readily available.

10   Q.   But by that, you mean so far SNAP sales data has

11   not been released, and people typically don't release

12   their gross sales figures or their profit. Do they?

13   A.   I'm having trouble following that one. I'm not

14   sure I understand the question.

15   Q.   Okay. Never mind.

16   There are a number of other things to look at,

17   for example, the store's location, the store's pricing,

18   the store's products, that would be available to a market

19   researcher?

20   A.   I mean yeah. I mean a store's location, that's a

21   matter of public record.

22   And anybody can go into a store and see what

23   products are being offered and what prices are being

24   charged. Sure.

25   Q.   So the key issue then is what added value do SNAP

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 1        sales have to this market research.  Would that be fair?

 2        A.   Well, I guess are you asking whether -- I don't

 3    know that I understand the question.

 4             Are you asking would I want that information?

 5        Q.   Well, it's true that it's added information, and

 6    generally more information is better than less

 7    information.  Is that fair?

 8        A.   I would say that from the perspective of market

 9    research, the more information you can get, the better.

10             I guess if you're asking if this sort of SNAP

11    information is available, I don't think it is.

12             So I think disclosing this would introduce

13    information that is not currently today publicly

14    available.

15        Q.   You said Kmart wants to be all things to all

16    people.  Is that right?

17        A.   Yes.  I think we aspire to be.  I don't know

18    whether we succeed.

19        Q.   But at the same time, you are trying to be

20    careful about how you market yourselves with respect to

21    SNAP customers?

22        A.   I don't know that that's true.  I think we're

23    strategic about our marketing.  I don't think we market

24    as to SNAP customers, per se.

25             We definitely do marketing directed towards
```

1   low-income individuals; low-income individuals who would

2   be more apt or more likely to be part of the SNAP

3   Program.

4   I think some would characterize Kmart in some

5   ways as a discount retailer, so we definitely focus on

6   that particular market segment. It's important to us.

7   Q.   And really what actually would happen, with the

8   disclosure of annual sales or annual payment amounts to

9   SNAP retailers, to all individual SNAP retailers, we

10   don't really know what would happen. Do we?

11   A.   I mean you're asking me what would happen in the

12   future? So, no, I don't know what would happen.

13   But I think it's likely that the release of SNAP

14   data is something that will be analyzed and focused on,

15   and retailers, Kmart competitors, will attempt to make

16   use of it to attract more business, attract more

17   customers.

18   As I said, Kmart is concerned about maintaining

19   the customers that it has, and thinks, on balance, this

20   information getting out makes it more likely that we lose

21   customers than that we gain marginal customers.

22   Q.   Because there are people even bigger than you.

23   A.   Certainly I think having additional resources to

24   use this data, to incorporate it into the other market

25   research that they have, I think having those additional

1   resources makes it easier to derive lessons from it and

2   derive value from it and make it useful. Yes, I do.

3   Q.   But you have some of that same benefit. Right?

4   A.   I mean I don't deny that if there's a release of

5   this data, that the data would be equally available to

6   Kmart as it is to our competitors.

7   That's my understanding, anyway. I guess I don't

8   know exactly how the disclosure would work, assuming the

9   Court rules that way.

10   Q.   Are you suggesting that if a competitor, capable

11   of taking advantage of information that not everybody is

12   capable of taking advantage of, that competitor saw

13   unusually good SNAP sales, that they would target that

14   store?

15   A.   I mean you are asking me to speculate what a

16   competitor would do.

17   I would say that most companies don't disclose

18   details about individual store performance at all. It's

19   just not something that's disclosed.

20   Having that information available in a particular

21   category, it could provide all sorts of insights. If

22   there's a particular high volume of SNAP sales at a

23   particular store, that could inform a would-be competitor

24   that they have a market opportunity.

25   If they don't have equivalent SNAP level sales at

1   a store that's located nearby, certainly if I was looking

2   at that, that's a lesson that I would draw.

3   It might also inform decisions about what other

4   sort of products that you carry. If you know that SNAP

5   customers at your stores also buy products in other

6   categories, and you see that there's a high volume of

7   SNAP purchasers in a particular area based on another

8   competitor's data, then you might decide, "Well, I need

9   to add those product assortments or increase those

10   product assortments in my store in the area, because I

11   know those SNAP customers also buy these other items. I

12   need to focus on those, as well."

13   It could inform your marketing. In the retail

14   industry, at least for Kmart, marketing is highly local.

15   We market through a variety of channels.

16   We pay attention to every bit of information

17   about who the members and customers are who shop at a

18   particular store, what they are buying, and we try to

19   target them as effectively as possible.

20   I'm sorry, I went on very long. I don't know

21   that I answered your question.

22   Q.   But you do have methods of your own in which to

23   stay competitive?

24   A.   We do try, yes. Absolutely.

25   Q.   And is it not possible that there are a number of

1   other factors that would dictate the failure or success

2   of a competitor coming in or making an effort to steal

3   somebody's SNAP business, if they knew it?

4   A.   I mean if you are asking if I can isolate the

5   release of SNAP data as being responsible for the loss of

6   sales at a particular store, you're asking me what's

7   going to happen in the future, I can't do that

8   fundamentally.

9   But even if I could, you're right, I don't know

10   that I could focus and say, "Yes, this SNAP data is

11   responsible for a particular loss of sales."

12   But I do know that Kmart believes, I believe that

13   the disclosure of this information provides an additional

14   tool that competitors will use to try to steal -- I said

15   "steal" -- take away Kmart customers, and we think that

16   could cause Kmart substantial economic harm.

17   Q.   "Take away," "steal." Another word would be

18   maybe "compete for"?

19   A.   Sure, although successfully compete for, I guess

20   is the way of saying it.

21   Q.   We're not sure they would be successful. Are we?

22   A.   You're right. You're asking me to talk about

23   what might happen in the future, and I don't know. I

24   wish I knew.

25   Q.   And there's also this possibility that a good

1   store, in terms of SNAP volume, let's say unexpectedly

2   high SNAP volume, because I assume, correct me if I'm

3   wrong, but you're looking at the playing field, and you

4   were able to see an annual amount that each one of the

5   SNAP retail stores got from Government under this

6   program.

7   Would you not agree that probably the bulk of it

8   wouldn't cause you any reaction one way or the other

9   competitively?

10   A.   I don't know how to answer that question. I

11   don't know that I understand the question. I'm sorry.

12   Q.   I'm asking you, you know all the competition out

13   there right now, and I don't mean for SNAP. I just mean

14   your general grocery competition.

15   Marketing decisions are made whether to expand or

16   contract every day in the grocery business and every

17   other industry, whether it's big, small, or indifferent.

18   I'm asking you if, with that playing field, when

19   you add on top of that, now that you have the knowledge

20   of each one of these stores' annual SNAP volume, would

21   you not anticipate that most of it would be something

22   that you would have already expected to fall into a

23   certain range, that doesn't really catch your eye, either

24   high or low?

25   A.   I have no way of knowing that. I don't know.

1   I would say that I'm sure there would be

2   variations in SNAP sales at particular stores, in

3   particular regions, particular states.

4   To the extent SNAP sales at one store,

5   Competitor A, are different than the SNAP sales at

6   Competitor B, that are in close proximity to one another,

7   that would be information that we, at Kmart, would

8   consider interesting and useful, and we would use to

9   refine our decisions that we make at one of those stores.

10   Either way.

11   Q.   I'm not suggesting if you got this information,

12   you would burn it and forget it.

13   A.   I know. I'm sorry.

14   Q.   No, no. I'm just trying to get to the point of

15   trying to figure out --

16   A.   I mean if you're asking me what the data from our

17   competitors is going to show, I don't know. I don't

18   know, because it's not available.

19   Q.   Would it be fair to say, though, that when we're

20   getting into this area of the feared competitor seeing a

21   SNAP volume that attracts its attention, that it's

22   probably an amount that they are not expecting to see?

23   A.   I don't know.

24   I mean certainly I assume, I speculate there will

25   be instances where the SNAP data at a particular store is

1   equivalent to the SNAP sales at an equivalent Kmart.

2   There may be other instances where it's more or

3   less. I just don't know.

4   Q.   Are you familiar with the SNAP -- I'm not asking

5   you this to put you on the spot.

6   A.   That's okay.

7   Q.   Are you familiar with the SNAP website and the

8   information that's available on it to the general public?

9   A.   In preparation for this, I did actually take the

10   time to go to the SNAP website.

11   But if you're asking me what sort of detailed

12   information is there, I confess, I didn't look at that.

13   Q.   I won't get too detailed. You could find out all

14   the SNAP retailers in the country, can you not, by

15   location?

16   A.   Yes. That's my understanding.

17   Q.   And, demographically, you can find out by

18   congressional district where all the SNAP recipients are.

19   A.   That is also my understanding.

20   Q.   So there is a fairly substantial wealth of

21   information, is there not, already about SNAP potential?

22   A.   I would say that there is some information. I

23   would say that none of that is as of high quality or is

24   as useful as the specific information about SNAP sales at

25   individual stores.

1   Q.   And is it just possible that if we use the

2   example of Store A going after Store B because Store B

3   has a number that they say, "Wow, that looks like a

4   pretty good place. Maybe we ought to go there."

5   Or is it just possible that Store A would say --

6   look at Store B's nice numbers and say, "They must be

7   doing a hell of a job. I better stay away from there."

8   Is that also a possibility?

9   A.   I mean I can't speculate how one of our

10   competitors would react.

11   I do know that if Kmart saw that a competitor had

12   particular success selling into a particular product

13   segment or to a particular type of member or customer,

14   and we were not having an equivalent level of success at

15   a nearby store, we would focus on trying to improve in

16   that area.

17   Q.   Improve in that area doesn't necessarily mean

18   trying to take away that particular store's customers,

19   though.

20   A.   Well, I mean to some extent retail is a zero-sum

21   game. A sale at Kmart is a lost sale at one of our

22   competitors.

23   Q.   Which sort of blends in, does it not, with the

24   idea that everybody gets the information if this is

25   disclosed?

1   A.   I agree that -- it's my understanding that

2   everybody gets the information.

3   As I explained, we, at Kmart, are concerned that

4   other, more well-heeled competitors would be able to do

5   more with it and do a better job with it.

6   Q.   Just a couple more things, Mr. Johnstone.

7   A.   Sure. No problem.

8   Q.   I know you haven't been innately involved in

9   SNAP, per se, with Kmart. But would you not agree some

10   competition is good for the SNAP recipient?

11   A.   I mean I think competition is good for America.

12   Q.   Thank you.

13   A.   So I'm sure to the extent there's competition in

14   retailers, that ultimately benefits consumers, including

15   SNAP purchasers. So, yes, I agree with that.

16   Q.   So competition is good for America, but not too

17   much competition?

18   A.   I don't think I'm saying that.

19   I'm saying that information that we consider

20   proprietary and confidential that we submitted to the

21   Government, with the understanding that it would be kept

22   confidential, we're concerned that the release of that

23   will cause us substantial competitive harm.

24   You can say that that's the impact of the free

25   market, if that's your view.

 1   All I can say is we are concerned about what we

 2   think the likely negative effects are of the release of

 3   the information, which is information we keep

 4   confidential and we don't disclose to anyone.

 5   Q.   Okay. I would agree then that -- let me see if I

 6   can state this.

 7   You're saying that the Kmart attitude is this

 8   information is proprietary, confidential, secret.

 9   Yet, is it not the payment under a Government

10   program?

11   A.   It is.

12   Q.   Which, would you not agree, is somewhat different

13   from some of the other financial information that you

14   might consider secret in terms of its evolution? I'm not

15   sure of a better way to put it. Origin, derivation?

16   MS. BENGFORD: Objection. Relevance. It

17   goes to the public policy issue, which isn't the issue

18   before the Court.

19   THE COURT: Sustained.

20   MR. ARNESON: Can I have my objected question

21   read back to me, so I can get back to where I was? I'm

22   not going to re-ask it, but --

23   (The requested portion of the record was read by the

24   reporter.)

25   BY MR. ARNESON:

1   Q.   Would you agree that your definition of what you

2   consider -- well, first of all, we're not, just to be

3   clear, we're not asking what you are providing to the

4   Government here. We want to know what they are paying

5   you under the program. Is that understood?

6   A.   Okay.

7   Q.   Does that affect at all your definition of what

8   you consider proprietary, confidential?

9   A.   Not really. It's basically the photographic

10   negative of the SNAP sales at our store.

11   Anybody could essentially take that negative and

12   recreate the photograph.

13   Q.   And you could also leave the SNAP Program.

14   Right?

15   A.   Yes. I guess theoretically that's an option.

16   Q.   So your participation carries with it no

17   expectation on your part that you may lose some of your

18   right of privacy?

19   A.   Well, to the extent I understand the question, I

20   disagree with it, because I think it is our expectation

21   that this information is confidential and will be kept as

22   confidential by the Government at the store level.

23   Q.   That's your expectation. I guess the point of

24   this case, is it not, is whether that should be the legal

25   interpretation.

1   A.   I can see that that's the issue that's before the

2   Court, as I understand these proceedings.

3   MR. ARNESON: Thank you, Mr. Johnstone.

4   THE COURT: Miss Bengford?

5   MS. BENGFORD: Nothing additional,

6   Your Honor.

7   THE COURT: You can be excused then.   Thank

8   you.

9   THE WITNESS: Thank you very much for the

10   opportunity to be heard, Your Honor.   I think I drank

11   all the water, by the way, so we might need a refill

12   for the next witness.

13   THE COURT: Thanks.

14   MR. CLAYTON: Your Honor, counsel, thank you

15   on behalf of Kmart.

16   THE COURT: Thank you.

17   (Witness excused)

18   (End of Andrew Johnstone's testimony at 4:40 p.m.)

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1   UNITED STATES DISTRICT COURT
     DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
2   SOUTHERN DIVISION

3

         I, Jill M. Connelly, Official United States
4   District Court Reporter, Registered Merit Reporter,
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5   certify that the above and foregoing transcript is the
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6   testimony, consisting of Pages 1 - 38.

7   I further certify that I am not a relative or
     employee or attorney or counsel of any of the parties
8   hereto, nor a relative or employee of such attorney or
     counsel, nor do I have any interest in the outcome or
9   events of the action.

10   IN TESTIMONY WHEREOF, I have hereto set my
     hand this 19th day of June, 2016.
11

12   /s/ Jill M. Connelly
                     _____
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